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October 4, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation
CS Docket 98-120
CSR-5562-Z

Dear Ms. Dortch:

This is to notify you that on October 3, 2002, Guenter Marksteiner, Frank Jazzo, Esq. and I met with Catherine Bohigian, Legal Advisor to Commissioner Kevin Martin, Stacy Robinson, Legal Advisor to Commissioner Kathleen Abernathy, and Susan Eid, Legal Advisor to Chairman Michael Powell, regarding pending petitions for reconsideration of the Commission's *First Report and Order* in CS Docket 98-120 as well as a pending petition for reconsideration of the January 23, 2001 WHDT-DT Memorandum Opinion and Order. The discussions covered some or all of the material in the attached handout, with the focus on the need to uphold the Commission's prior rulings that a DTV-only television station is entitled to carriage of a single channel of video programming on cable systems, and may elect carriage in analog format on those systems.

Pursuant to Section 1.1206 of the Commission's rules, two copies of the written presentation are enclosed for each of the above captioned dockets.

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October 4, 2002
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if you have any question, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul Feldman", with a long horizontal flourish extending to the right.

Paul J. Feldman
Counsel for Guenter Marksteiner

PJF.jpg

Enclosure

cc Ms. Susan M. Eid
Ms. Stacy Robinson
Ms. Catherine C. Bohigian

Presentation of Station WHDT-DT, Stuart, Florida
On Docket CS 98-120 (Digital Must Carry)

- Guenter Marksteiner is the permittee of Station WHDT-DT ("WHDT"), Channel 59, Stuart, Florida. A new state-of-the-art digital facility has been constructed, with an investment of over \$13 million. The Station currently broadcasts a single HDTV stream of locally-produced programming and English-language international news from the German network Deutsche Welle.
- There has been substantial local interest in WHDT's service, with regular coverage in local newspapers, and inquiries as to locations to purchase digital receivers. Nevertheless, it will be some time until there is significant penetration of digital receivers in the market. Cable carriage is necessary for any station to flourish, but is particularly necessary for new stations, and stations at the vanguard of the digital revolution.
- On January 23, 2001, the Commission issued a MO&O declaring that WHDT-DT as a new DTV-only television station, is entitled to carriage of a single channel of video programming (without ancillary or supplementary services), and may elect carriage in analog format.¹ This was a unique and narrow ruling, not involving issues of carriage of multiple digital channels, or carriage of both the analog and digital signal of the same station at the same time. On the same day, the Commission also issued its First Report & Order/FNPRM in this proceeding, also holding that DTV-only stations are entitled to carriage, in analog format.²
- The two Orders cross-referenced each other, and used the same bases for their holdings: 1) the requirement in Section 614(b)(1)(B) to carry "local commercial televisions stations" and 2) the finding, first suggested in the *700 MHz* proceeding, that carriage in analog format at least in the short term will promote the DTV transition by giving broadcasters a greater incentive to turn in their analog channel, knowing that digital stations will have an opportunity to reach viewers without digital equipment during the transition.
- By giving DTV-only stations access to the majority of viewers during the transition, the two Orders also preserve the benefits of free, over-the-air local broadcasting television, consistent with the principle underlying Section 614 of the Communications Act, and the Commission's mandate in the DTV proceeding "to promote and preserve free, universally available, local broadcast television in a digital world."
- After extensive negotiations, the Station is beginning to obtain cable TV carriage from Adelphia, and will shortly be carried in analog format on all Adelphia

¹ WHDT-DT, Memorandum Opinion & Order, 16 FCC Rcd 2692, 2698-99

² DTV Must Carry First Report & Order/FNPRM, 16 FCC Rcd 2598, 2605, 2630

systems.

- Nevertheless, Adelphia previously filed a petition for reconsideration of the WHDT Order and Adelphia, Time Warner and NCTA filed for reconsideration of the relevant portions of the DTV Must Carry Order. Their arguments are fatally flawed:
 - *Misinterpretation of Section 614(b)(4)(B)*: The Petitions ignore the core Section 614(a) requirement to carry all local commercial television stations, but rather focus on one word in Section 614(b)(4)(B): "signal". That Section requires the Commission to enact rules to ensure the carriage of the "signals of local commercial television stations which have been changed [to conform with DTV standards]" The Cable Operators then assert that the analog feed of a DTV station is not the "signal" of a station, and thus need not be carried. But this ignores the reality of how many must-carry broadcast signals are delivered to cable operators, and the Commission precedent surrounding such delivery. The signals of many analog must-carry stations are delivered to cable headends in digital format on fiber, and then reconverted at the headend. Under the theory in the Petitions, this negates the rights of analog stations to carriage, but the Commission has ruled otherwise.³ The Petitions attempt to turn Section 614(b)(4)(B) on its head by reading it as a limitation on must-carry, when it was written to give the Commission broad authority ("any changes necessary") to "ensure" carriage of DTV stations.
 - *Constitutional Arguments*: The Petitions make constitutional arguments which were generally considered and rejected in the Commission's Orders: 1) the existing record is insufficient to support the burden analog carriage of DTV-only stations imposes on cable operator speech; 2) carriage of such stations in analog format does not further important governmental interests; and 3) carriage of such stations in analog format burdens more cable operator speech than necessary to protect any governmental interests.

-There was substantial evidence in both proceedings regarding the nature of analog carriage of a DTV signal, as well as the need for analog carriage of DTV-only stations. For example, in the Letter Request that led to the *WHDT-DT Order*, it was demonstrated that the analog version of the WHDT signal to be carried by the cable operator will be equivalent in bandwidth and function to the transmission of a traditional analog TV station. No cable operator contested this fact in comments in that proceeding or on reconsideration. The Commission can certainly also rely on its

See, e.g., *Must-Carry Clarification Order*, 8 FCC Rcd 4142, 4143 (1993); *In re Complaint of WWAC, Inc.*, 13 FCC Rcd 7219 (CSB, 1998).

extensive knowledge, based on over 30 years of regulating cable carriage, that the analog carriage requirement in the *DTV Must-Carry Order* is identical to that upheld by the *Turner Court*.

-Governmental Interests The operators claim that provision of analog carriage to DTV-only stations for a limited time will not serve important governmental interests. These assertions are not true, as analog carriage of DTV-only stations will serve the same interests as the carriage of traditional analog stations upheld by the *Turner court*. 1. Cable carriage now is necessary if DTV-only stations are to survive to provide free over-the-air service to viewers who will be purchasing digital receivers over the next few years. 2. DTV-only stations such as WHDT will be providing unique news and informational programming to local viewers. 3. As a new video service (and potential multichannel competitor for advertising revenue), there is little incentive for cable operators to carry new DTV-only stations without carriage requirements.

-Burden on Cable Operators The Petitions suggests that grant of analog carriage rights to DTV-only stations would impermissibly burden cable operators. This argument is mystifying since the analog NTSC version of a DTV-only station will be equivalent in bandwidth and function to the transmission of a traditional analog TV station. Thus the "burden" of carrying a DTV-only station in analog format will be no different than the "burden" on a cable system resulting from carriage of a traditional analog station, and that burden has already been upheld in the *Turner case*.

- Some Petitioners assert that creating analog carriage rights for DTV-only stations is inconsistent with the DTV transition, since it does not incent the purchase of DTV receivers. However, such carriage rights promote the digital transition by helping ensure the survival of a DTV station to the end of the transition, while DTV receivers penetrate the market. Such rights also promote the ability of viewers to see the programming of new DTV-only stations prior to the time when digital receivers fall to a more affordable level. It is not the purpose of must-carry to promote the purchase of DTV receivers, but rather to preserve the DTV-only stations until DTV receivers penetrate the market due to other forces. This rationale is reflected in para. 74 of the *DTV Must-Carry Order*.
- Satellite Carriage: Due to the receivers provided by DBS operators to their subscribers, there is no need for carriage in analog format on DBS. However, if the Commission enacts DBS carriage rights for DTV stations, it should open a new window for elections, since the next cycle does not begin until 1/1/2006.

Adelphia Cable will add 3 new channels next month

Adelfia Cable, the dominant cable provider in Martin and southern St. Lucie counties, will rearrange part of its lineup Oct. 15 to make room for three new channels.

The new stations:

► **The Hallmark Channel** (Adelphia Channel 57) — Launched in August 2001, the Los Angeles-based network offers a mix of "Hallmark Hall of Fame" reruns, quality 9 p.m. movies, and repeats of such classics as "My Three Sons," "Bewitched," "Hart to Hart," "Dr. Quinn, Medicine Woman," "Northern Exposure," and the original black-and-white "Perry Mason."

► **Country Music Television** (Adelphia Channel 79) — The Nashville, Tenn.-based network began operations in 1983. Offerings include a variety of country music videos, interviews with country artists and live telecasts of the Grand Ole Opry. The network recently added reruns of the "Glen Campbell Goodtime Hour," which ran on CBS from 1969 to 1972 and "Best of Austin City Limits," a series which originally ran on PBS sta-



BOB BETCHER
media columnist

tions. Subscribers have hounded Adelphia for years to add this channel.

► **WHD** Channel 59/Stuart (Adelphia Channel 17) — WHDT, which will broadcast in high-definition, will carry a variety of offbeat programs, including fashion, music, plays, children's shows and news from Germany (presented in English). "We'll be having journalistic-type reports, including (shows) on the environment, dance, art, music — performance-type programming," said station owner Guenter Marksteiner.

The station, which operates out of West Palm Beach (though licensed to Stuart) and is considered a "must-carry," said it plans to broadcast a one-hour long-form daily newscast to air at a to-be-announced time slot between 5 and 8 p.m. (Antenna viewers already can pick up Channel 59 in limited areas of the Treasure Coast if they have an HDTV-

ready TV set.)

Marksteiner said the station will not be carried on AT&T Broadband, which serves Fort Pierce and Vero Beach — at least not yet.

WHD is the second TV station licensed to Stuart. The other is WTCN Channel 14.

To make room for the three new stations, Adelphia will move three existing channels to new slots on Oct. 15.

They are:

► **Discovery Health** will move to Channel 105 (extra-pay digital service is required).

► **EWTN/Catholic network** will move to Channel 72.

► **Great American Country** will move to Channel 79.

'Montel' on Fox29

"The Montel Williams Show," long a staple of WPEC Channel 12's 4 p.m. time slot, has changed channels in this market.

For readers who still haven't figured out the switch, the syndicated "Montel" now airs at 2 p.m. weekdays on WFLX Channel 29.



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